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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

LARRY D. WALLS,

Petitioner,

-vs-

COUNTY OF LOS ANGELES
OFFICE OF THE DISTRICT ATTORNEY,

Respondent.

On Petition For Writ Of Certiorari
To The California Court Of Appeals
Second Appellate District
Division Seven

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the imposition of a nexus requirement in an employment discrimination action brought under Title VII creates an impermissible infringement in federal substantive rights under the Fourteenth Amendment, where the factfinder has already found that the employee's transfer out of a prestigious prosecution unit and low appraisal of promotability was based on racial discrimination.

2. Whether the California Appellate Courts violated federal law in using an independent judgment standard of review to reverse findings of fact made by the Los Angeles Civil Service Commission, which found that Walls was transferred out of a prestigious prosecution unit and given a low appraisal of promotability solely because of his race.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner LARRY D. WALLS (hereinafter "Walls"), petitions for a writ of certiorari issue to review an opinion of the California Court of Appeal, Second Appellate District, Division Seven, which reversed the factual findings of the Los Angeles County Civil Service Commission which found that Walls was transferred out of a prestigious prosecution unit and given an unjustifiably low appraisal of promotability based on racial discrimination and other "animus."

The case below involved the Los Angeles County District Attorney's Office, former Los Angeles County District Attorney Ira Reiner, current Los Angeles County District Attorney Gilbert Garcetti, and six other managers and supervisors. The respondents are the individual members of Los Angeles County and the Los Angeles County District Attorney's office that was responsible for the transfer and low appraisal of promotability given to Walls. The County of Los Angeles is the agency that employs the Petitioner and Respondents and is responsible for the fair treatment of its employees.

OPINIONS BELOW

The published decision of the California Court of Appeal, Second Appellate District, Division Seven, *Los Angeles County Office of the District Attorney v. Civil Service Commission of the County of Los Angeles (Walls, real party in interest)* (1997), 55 Cal. App. 4th 187, 63 Cal. Rptr. 2d 661, was entered on May 7, 1997. (See Appendix A.) The Petition for Rehearing to the California Court of Appeal,

Second Appellate District, Division Seven was denied on May 22, 1997. (See Appendix B.) The Petition for Review to the California Supreme Court was denied on July 23, 1997. (See Appendix C.) The Los Angeles Superior Court denied the District Attorney's Petition for Writ of Mandate on March 22, 1994. (See Appendix D.) The published decision of the Civil Service Commission was entered on December 2, 1992. (See Appendix E.) The Civil Service Commission Minutes of its New Proposed Decision of July 1, 1992. (See Appendix F.) The Civil Service Commission Minutes of its New Proposed Decision was entered on October 28, 1992. (See Appendix G.) The Civil Service Commission Minutes of its Final Decision was entered on December 2, 1992. (See Appendix H.)

JURISDICTION

Supreme Court jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(a) and Supreme Court Rule 10(c).

This petition was filed within ninety (90) days after the California Supreme Court denied Walls petition for rehearing on July 23, 1997.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

wherein they reside . . . No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of law.

FEDERAL STATUTORY PROVISION INVOLVED

Title VII, of the Civil Rights Act of 1964, 42 U.S.C.A. Section 1981-83:

"It shall be an unlawful employment practice for an employer –

"(1) . . . to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race . . . "

CIVIL SERVICE RULE INVOLVED

Civil Service Rule 25.01:

"No person in the classified service or seeking admission thereto shall be appointed, reduced or removed, or in any way favored or discriminated against in employment or opportunity for employment because of race, color . . . "

STATEMENT OF THE CASE

Statement of Facts

Petitioner ("Walls"), an African American, deputy district attorney, began working for the Los Angeles District Attorneys Office ("DA") in July 1983. Walls was assigned to Compton misdemeanors and preliminary hearings division. During this time Walls tried thirteen jury trials and obtained eleven convictions.

In 1984, Walls was promoted to Grade II, Walls received the highest performance evaluation rating of "Competent Plus" by Head Deputy Ronald Ross. (C.T. Vol. 4, p. 820.) As a Grade II, Walls tried 19 felony jury trials in 17 months including a murder trial. Walls received the highest performance evaluation rating of "Outstanding" by Head Deputy Robert Heflin. (C.T. Vol. 8, p. 818.)

In 1986, Walls was transferred to downtown central trials. While in central trials Walls tried felony cases. In 1986 Walls had eleven felony jury trials including several murder trials obtaining convictions in each case. Walls, during this period, received a performance evaluation rating of "very good plus." (CT Vol. 4, p. 815.)

In 1987, Walls applied for a Grade III promotion, Phil Mueller, Head Deputy and Appraisal of Promotability Evaluator, rated Walls "well qualified plus" and recommended that he be promoted to Grade III Deputy District Attorney. (CT Vol. 7, p. 613.) However, former Los Angeles County District Attorney Ira Reiner and the Appraisal of Promotability Committee did not follow the

recommendation of Mueller and rated Walls "low" and "non-promotable." (CT Vol. 7, p. 615.)

In February 1987 Walls, pursuant to Civil Service Rule 25.01 filed a grievance regarding the Appraisal of Promotability and non promotion as being racially discriminatory. The language of non-promotability was removed but the low appraisal score of eighty-six was unchanged. (CT Vol. 7, p. 486.) In January 1988, the grievance and appeal were settled; Walls was promoted to Grade III Deputy District Attorney. (CT Vol. 7, p. 1608.)

In January 1988, based upon the recommendation of Joe McKinley, the new deputy-in-charge in the Compton Hard-core Gang Unit and Phil Mueller, Walls was assigned to Compton Hardcore (Hardcore) a specialized prosecution unit that only tried violent crimes involving gang murders.

In December 1988, Joe McKinley transferred out of the Los Angeles District Attorney's office to the Orange County District Attorney's office. Walls and other Hard-core Gang Unit deputies applied and were considered for the deputy-in-charge position. At the time of the deputy-in-charge opening, Walls had the most experience and seniority of all the Hardcore deputy candidates. The position was given to Deputy District Attorney John Allen, a white male, Grade III deputy with qualifications similar to Walls. (CT Vol. 8, p. 1830; CT Vol. 11, p. 2472.)

In May 1989, the position of deputy-in-charge of the Compton Gang Unit came open again; because John Allen was promoted to Grade IV and Assistant Head Deputy of the entire Los Angeles County Gang Unit. Walls again applied for the deputy-in-charge position but was denied.

(CT Vol. 11, p. 2474.) The position was given to Deputy District Attorney Joe Markus, a white male, who was hired for the deputy-ir.-charge position, despite having less seniority and less trial experience than Walls.

Walls was denied performance evaluations

Inexplicably, Walls did not receive performance evaluations from 1988 to 1990. Micheal Genelin, Head Deputy for the Gang Units was responsible for giving yearly written performance evaluations to all the deputies in Hardcore. Past performance evaluations serve as an important factor for determining future promotability. *As a result, of not receiving yearly performance evaluations for a two year period Walls was effectively denied an opportunity for promotion, but more importantly, Walls was precluded from collecting concrete evidence to support his claim of racial discrimination. The performance evaluations are the best source to prove disparate treatment. Walls had used performance evaluations for 1984-1985, 1985-1986 and 1987-1988 to support his contention of wrongful denial for the Grade III promotion.*

In September 1989, Walls was selected to participate in a "Top Gun" seminar sponsored by the California District Attorneys Association. Only the top prosecutors in the state were selected. (CT Vol. 9, p. 2006.) Walls and three other members of Hardcore were selected to attend the Top Gun seminar. (CT Vol. 12, p. 2787.)

Walls was at the Top Gun seminar in San Luis Obispo when a story reported in the Los Angeles Times, alleged

that the Los Angeles County District Attorney was improperly obtaining convictions based upon perjured confessions by jail house informants. One case that was part of the report was *People v. Vargas*. *Vargas* was a rape/murder case that Walls had tried in 1986-1987. The jury convicted Vargas of first degree murder and attempted rape. Vargas was sentenced to 25 years to life in prison.

The Vargas case

Walls returned to Compton after the Top Gun seminar. Walls was informed that John Lynch, the Director of Central Operations, wanted to talk to Walls regarding the *Vargas* case. The DA was considering whether to concede a motion for a new trial in *Vargas* based on the discovery that a witness who was used by Walls in the *Vargas* trial, was a jailhouse informant and supposedly classified as a pathological liar. *After an intensive investigation into the Vargas case Walls was cleared of any wrongdoing, but Vargas was granted a new trial.* (CT Vol. 10, p. 2369; CT Vol. 11, p. 2482.)

On January 29, 1990, at the suggestion of Michael Genelin, Dan Murphy, Director of Special Operations, met with Walls to explain why *Vargas* was granted a new trial. Murphy in that conversation assured Walls that he did nothing wrong in connection with the *Vargas* case. (CT Vol. 11, p. 2482.)

The "nigger" incident

When Walls returned from the Top Gun seminar he was informed by deputy Mark Ashen that John Lynch,

the Director of Central Operations wanted to see him. Lynch wanted to speak with Walls regarding the *Vargas* trial. At this time, deputy Mark Ashen joked that Walls was going downtown to be "lynched." In the presence of deputies Mark Ashen, Mark Schwartz and Kevin McCormick deputy-in-charge Joe Markus came into Walls' office, simulating that he had a cigar and using a Southern drawl said "Yeah, the office has a rope for a lynching, all we need is a Nigger, and Walls, you're it." (CT Vol. 8, pp. 1834-36; Vol. 10, p. 2259; Vol. 12, p. 2698.)

Markus asked Walls not to say anything about the nigger comment.

The Russell Case

In late July 1990, Walls finished trying a death penalty jury trial in *People v. Buenrostrous*. The case had ended in a hung jury. Walls was scheduled to begin his vacation on July 30, 1990. Walls tried to continue the trial dates in cases he was prosecuting. In one such case *People v. Russell* the defense attorney was unwilling to continue the trial date. On July 23, 1990 Walls informed Markus that *Russell* was set for trial during his vacation and asked that the case be reassigned. Markus told Walls to get the case continued or dispose of it because he was preparing his own death penalty trial and did not have time to deal with it. Subpoenas had been sent to Detective Alduenda, but the subpoenas were not served. (CT. Vol. 12, p. 3114.) Walls turned the case over to Gretta Walker pursuant to Markus' instructions. On July 30, 1990, the *Russell* case was dismissed because the witnesses could not be served.

On August 1, 1990, Markus wrote and sent a memorandum to Genelin, alleging that Walls had intentionally allowed the *Russell* case to be dismissed because he did not want to try the case. (CT Vol. 12, p. 2720.) In the memorandum to Genelin, Markus claimed he never knew about the *Russell* case until the Friday before the trial date; when in fact, Walls had informed Marcus of his vacation and the Russell case a week before July 30, 1990.

On August 14, 1990, when Walls returned from vacation he was immediately summoned to Genelin's office. When Walls entered Genelin's office Allen and Markus were also present. Genelin asked Walls why witnesses were not subpoenaed in the *Russell* case. Walls explained to Genelin why the witnesses were not subpoenaed. Walls' version of the story was different from Markus' memorandum of August 1, 1990, which implied that Walls intentionally did not issue subpoenas so that the *Russell* case would be dismissed. (CT Vol. 12, p. 2725.) After the meeting Genelin caused a memorandum to be drafted which cleared Walls of any wrongdoing in the *Russell* case. (CT Vol. 12, p. 2863.) In this memorandum, Allen and Genelin concluded that Walls had all the appropriate answers. In actuality, Walls had handled the *Russell* case in the appropriate manner. (CT Vol. 13, p. 2864.)

On August 15, 1990, Walls asked Markus for a copy of the memorandum that Markus had sent to Genelin about the *Russell* case. At first, Markus refused to give Walls a copy stating, "he [Walls] could see a copy [of the memorandum] when he subpoenaed it for court." Walls left and went to the court. When Walls returned, Markus had placed a copy of the memorandum on Walls' chair.

When Walls read the memorandum and saw the misrepresentations in the Markus memorandum, Walls decided to write a reply. (CT Vol. 8, pp. 1837-42.)

The dispute regarding the memorandum led to a loud verbal argument between Markus and Walls, in Walls' office, that lasted for two or three days. (CT Vol. 9, p. 2117.) On August 16, 1990, Markus made threats he was going to get Walls transferred from "this cushy job that you have. I'm going to get you transferred, I'm going to get you out of here." (CT Vol. 8, p. 1841; CT. Vol. 12, p. 2744.) Markus told Walls "Larry, it doesn't look like we can work together with this kind of problem that's going on. It doesn't look like we can work together." (CT Vol. 12, pp. 2745, 1-3; CT Vol. 10, p. 2236.)

Deputy District Attorney Gretta Walker, a co-worker in Compton, testified she heard Markus arguing with Walls in Walls' office over a two or three day period about the *Russell* case. She heard Markus say to Walls about being transferred and Walls responding, "that it was up to you, you are the supervisor." (CT Vol. 12, p. 2814.) Walker also heard each man call the other out, and that "we can take this outside." In reality, Markus told Walls while mimicking black jargon, "Yeah, man, you want to settle this man to man." (CT Vol. 9, p. 2128.) The next day, Walker told Markus "this had to stop" and as a supervisor, he had to stop going to Walls' office and starting these arguments. (CT Vol. 12, pp. 2814-16.) That same day, Markus apologized to the whole staff for his inappropriate behavior and unprofessional conduct. (CT Vol. 10, p. 2201; CT Vol. 10, p. 2243.) Despite, admitting to the entire office that his conduct was inappropriate and

unprofessional, Markus, never endured any negative repercussions for his admittedly wrongful conduct.

The Transfer

The transfer came after Grade IV examinations. (CT, Vol. 13, p. 2932:1-9.) On or about September 24, 1990, Walls was notified of his transfer out of Hardcore on grounds that he had a problem with Markus. While Walls had requested a transfer to Santa Monica, the DA transferred him to Long Beach. Walls filed a grievance over this transfer and was ultimately transferred to Santa Monica. Resolution of this matter took approximately eighteen months. (CT, Vol. 8, pp. 1843-1852.) The decision to transfer Walls was made by Markus and was approved up the chain of command (CT, Vol. 13, pp. 3028:17 - 3029:4.), even though Markus' superiors Allen, Genelin, and Murphy were aware of Markus' inappropriate conduct with respect to Walls. (CT, Vol. 12, p. 2855; CT, Vol. 13, p. 3101; CT, Vol. 13, p. 3025.)

Gregory Thompson, Chief Deputy and Director of the AP Committee testified that Markus "acted unprofessionally and used poor judgment with respect to the treatment of Walls. (CT, Vol. 13, pp. 3005-3006.) Markus acted inconsistent with expectations of supervisors in his position." Markus' unprofessional conduct and poor judgment were apparently considered by members of the AP Committee. Despite, using a racial epithet and acting unprofessionally, Markus was given a 100 AP and promoted to Grade IV. (CT, Vol. 13, p. 3025.) Walls on the other hand, was transferred out of Compton Hardcore and was not promoted.

2. Proceedings and Decision in the Court Below.

On October 19, 1990, Walls brought an action under Title VII of the 1964 Civil Rights Act claiming that he was transferred out of a prestigious prosecution unit (Hard-core) and given a low Appraisal of Promotability score solely on the basis of his race. Moreover, Walls alleged that the transfer and low appraisal of promotability was in retaliation for filing the grievances. (CT Vol. 1, pp. 64-68.)

The issue of racial discrimination in the transfer and the low appraisal score of Walls was tried before the hearing officer of the Civil Service Commission. (CT Vol. 1, pp. 30-31.) The Commission, pursuant to Civil Service Rule 4.13[1] rejected the hearing officers findings of fact and conclusions of law, and ordered their legal advisor, county counsel to prepare new findings of fact and conclusions of law. (See Appendix G.) The Commission became the factfinders by rejecting the hearings officers' findings of fact and conclusions of law and adopting their own findings, which were prepared by county counsel. (CT Vol. 1 p. 70:9-10.) (See Appendix E.)

On January 22, 1992, the Commission served its Notice of Proposed Decision for objections. (CT Vol. 3, p. 530.) On February 5, 1992 the DA filed objections to the Proposed Decision. (CT Vol. 3, p. 533.) On February 10, 1992, after reading the record and transcripts of the administrative hearing the Commission overruled the

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[1] . . . The commission may either adopt the report of the hearing board as its proposed findings and conclusions . . . or draft its own findings and conclusions.

DA's objections and sustained Walls' objections to the hearing officers findings. On December 2, 1992, after reading the entire record before the hearing officer, the Commission adopted its own findings, conclusions and decision as prepared by their legal advisor County Counsel.[2] (See Appendix H.) The Commission therefore became the factfinders.

The Commission found that Walls transfer from Hardcore was an act of racial discrimination and that Walls' AP was improperly lowered. (CT Vol. 1, pp. 64-68.)

The DA on February 26, 1993 Petitioned the Superior Court for a Writ of Mandate to overturn the findings of the Commission. On April 5, 1993 Walls filed his answer to the Petition. (CT Vol. 1, p. 102.) On March 22, 1994, after hearing the arguments of counsel for the DA and receiving the documentary evidence, consisting of the Administrative Record, Administrative Exhibits, and the Reporter's Transcript of the administrative hearing, the Honorable Judge Robert H. O'Brien found that there was "uncontroverted" evidence of racial discrimination and other "animus" against Walls. Judge O'Brien affirmed the factfinders' decision that Walls' transfer from Hardcore and low appraisal score were acts of racial discrimination and found that there was substantial evidence in the record to support the Commission's findings and decision. (CT Vol. 5, pp. 1787-1789.) (See Appendix D.)

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[2] The DA attacked the adequacy of these findings throughout the proceedings in state court. The findings were, however, prepared by County Counsel (Attorneys for the County).

The DA appealed to the California Court of Appeals, arguing that there was insufficient evidence in the record to support the decision of the Commission and the trial court that Walls was the victim of racial discrimination.

The California Court of Appeals reversed the Commission's finding of fact. A Petition for Review to the California Supreme Court was denied on July 23, 1997.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW WHICH REQUIRES THAT PLAINTIFF IN A TITLE VII ACTION PROVE A NEXUS BETWEEN THE PROTECTED STATUS OF THE EMPLOYEE AND THE ADVERSE EMPLOYMENT DECISION IS IN DIRECT CONFLICT WITH *ST. MARY'S HONOR CENTER v. HICKS*, 509 U.S. 407, WHICH REQUIRES ONLY THAT THE PLAINTIFF PROVE TO THE FACTFINDER THE DISCRIMINATORY CONDUCT BY THE EMPLOYER

The Supreme Court decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 407, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993), held that the plaintiff has the ultimate burden of proof in persuading the factfinder of the ultimate question: "Whether plaintiff has proven that the defendant intentionally discriminated against [him] because of his race." (quoting *Burdine*, 450 U.S. at 253.) In this case the trier of fact found that Walls established by a preponderance of the evidence that he was transferred out of Hardcore and given an unjustifiably low AP based on racial discrimination. (CT Vol. 1, pp. 64-68.) Moreover, implicitly in the factfinders finding that the transfer out of Hardcore and the low AP was racially based; is the

rejection of the DA's proffered reasons for the adverse employment decision. Accordingly, Walls satisfied the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff, and as such "**no additional proof of discrimination is required.**" (*St. Mary Honor Center* at 253.)

The underlying California decision which requires that the employee prove an additional element of casual connection between the protected status of the employee and the adverse employment decision in Title VII actions is in conflict with federal standards **and should be reversed.**

II. THE DECISION BELOW CREATED AN ADDITIONAL STANDARD IN TITLE VII ACTIONS THAT IS NOT REQUIRED BY FEDERAL LAW

In *Mixon v. Fair Employment & Housing Commission*, 192 Cal. App. 3d 1306, 237 Cal. Rptr. 884 (1987), the California Court of Appeal stated: "While the California act and Title VII differ in some particulars, their objectives are identical." This action by Walls was brought in state court under Title VII. The evidentiary standards applicable to this and other employment discrimination cases were established by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). That case does not require an employee to prove or otherwise establish a nexus between the employers acts and the prohibited discrimination. California law does, however, impose such a nexus requirement, even in Title VII cases such as the one at bar.

Thus Walls was not only required to carry the *McDonnell Douglas* burden, but was also required to submit evidence tending to establish a nexus to prohibited discrimination. Once the finder of fact determines that the employee has rebutted the employers' presumption, no additional nexus should be required.

The present case was reversed in part because the Court of Appeal did not believe that Walls met his burden on this issue. Pursuant to *McDonnell Douglas*, however, Walls had no such burden. Nevertheless, assuming *arguendo*, that such a burden did exist, Walls met the nexus test under California law.

The following are a few examples of the discriminatory conduct by the DA against Walls, which demonstrates the casual connection between the adverse employment decision and Walls' protected status: (1) Genelin denied Walls' performance evaluation for two years, knowing that performance evaluations are critical factors in determining future promotability. (CT Vol. 4, p. 797; CT Vol. 8, pp. 1859-62; (2) suppression by Markus' supervisors of the knowledge of the "lynching a nigger" comment made by Markus while Markus was being evaluated for promotion. While simultaneously falsely accusing Walls of mishandling cases to deny Walls a promotion at the appraisal hearing. (CT Vol. 4, p. 797; Vol. 4, p. 815; Vol. 4, p. 818; Vol. 4, p. 820; CT Vol. 13, pp. 2921-24, Vol. 13, pp. 3017-18; CT Vol. 13, p. 3010.); (3) the testimony of Gregory Thompson that Walls was not graded low on his appraisal score based on lack of performance, but rather, because Walls wrote to the Los Angeles Time objecting to the reversal in the *Vargas* case. (CT Vol. 13, pp. 3012-13.); (4) the testimony by Murphy that the reasons stated in

the AP, the handling of the *Vargas* and *Russell* cases, were just a pretext for the DA's discriminatory conduct against Walls. (CT Vol. 11, p. 2633; CT Vol. 13, pp. 2947-49.)

III. A COURT OF APPEAL MAY NOT SUBSTITUTE ITS JUDGMENT AND FINDINGS OF FACT FOR THAT OF THE TRIAL COURT

In *St. Mary's Honor Center v. Hicks* 509 U.S. 407, 125 L.Ed. 2d 407, 113 S. Ct. 2742 (1993), this Court held that courts of appeal "**have no authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate fact-finder determines, according to proper procedures, that the employer has unlawfully discriminated.**" In that case, the employer appealed arguing that the evidence rebutting the employer's non-discriminatory reasons for actions taken, though false, they should still prevail. This court clearly held that Courts of Appeal should not substitute their judgment for that of the trier of fact.

In the present case, the Court of Appeal states in its opinion that it is applying the substantial evidence test, which also prevents courts of appeal from substituting their own judgment for that of the trier of fact. However, the Court of Appeal finds evidence in the record contrary to evidence which supported the Commission's findings. Thereafter, citing that evidence, the court found that there was no substantial evidence to support the Commission's findings.

Indeed, the general tone of the opinion suggests that the court of appeal issued a result oriented opinion which is repugnant to the holding of this court in *McDonnell*

Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). Walls in this case proved the *prima facie* case, the Commission and the trial court disbelieved the DA's explanation for the transfer and low appraisal of promotability. **Further, the DA's own employees testified under oath that the justification for Walls' transfer and low appraisal of promotability were false.** (CT Vol. 13, p. 2947; CT Vol. 13, p. 2949; Vol. 11, p. 2633.) Walls established sufficient facts from which a reasonable inference was drawn by the factfinder that the DA's office discriminated against Walls because of his race. The trial judge, in fact found uncontroverted evidence of racial discrimination. (See Appendix D.)

IV. THE CALIFORNIA COURT'S FAILURE TO APPLY THE PROPER STANDARD OF REVIEW IS A VIOLATION OF WALLS' SUBSTANTIVE AND PROCEDURAL RIGHT TO DUE PROCESS UNDER FEDERAL LAW

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973), this court established the certain modes and order of proof. *McDonnell Douglas Corp. v. Green* is the law by which the California Courts are bound when reviewing employment discrimination actions under Title VII and otherwise. An employee who establishes the required elements under that case is entitled to relief. The relief offered is based on important policy considerations designed to discourage acts of racial discrimination in the work place. In the present case, Walls met his burden and established each of the five elements of a prima facie case:

(1) Walls is an African American, a member of a protected class;

(2) Walls was qualified to work in hardcore gangs and qualified for the Grade IV promotion;

(3) Walls was discriminatorily transferred and denied a proper Appraisal of Promotability for racial reasons;

(4) Walls' position was filled by another and lesser qualified deputies were promoted and he was not; and,

(5) The reasons presented by the District Attorney for the discriminatory treatment were rejected by the factfinders as a pretext to hide its racially biased misconduct.

The Court of Appeal, however, denied Walls the remedy which is created by Title VII.

The California court's failure to actually apply the substantial evidence test constituted a denial of procedural due process. Further, the court's failure to give Walls the proper relief denied him his federal substantive rights under the Fourteenth Amendment.

V. THE CALIFORNIA SUPREME COURT HAS VIOLATED WALLS' RIGHT TO EQUAL PROTECTION

The *McDonnell Douglas* decision evidences an attempt to establish rules which are certain and consistent in employment discrimination cases. Walls, an African American, has proved disparate treatment in violation of the Fourteenth Amendment to the United States Constitution. Walls has proved his claim: the trier of fact found

racially motivated discrimination, the trial judge found uncontroverted evidence of discrimination. Nevertheless, the Court of Appeal refused to grant Walls his right to relief under Title VII. This decision as established violates federal jurisprudence and constitutes a denial of Walls' substantive and procedural due process rights as guaranteed by the Fourteenth Amendment. Additionally, Walls' constitutional guarantee of equal protection under the civil service rules were violated. The DA's cover-up of the "lynching a nigger" incident at the promotional appraisal hearing to protect Markus' promotion demonstrates a bias towards whites. Walls, on the other hand, was given an unjustifiably low Appraisal of Promotability, and was transferred based upon the false pretext offered by the DA, regarding Walls alleged mishandling of the *Vargas* and *Russell* cases. (CT Vol. 12, 2921-24; Vol. 12, 3017-18.) These blatant discriminatory actions by the DA, unconstitutionally deprived Walls of equal protection under the law, as guaranteed by the Fourteenth Amendment to the Federal Constitution.

CONCLUSION

For all these reasons, a Writ of Certiorari should issue to review the opinion of the California Court of Appeals, which reversed the decision of the factfinders: who found that Walls was transferred out of a prestigious prosecution unit and given an unjustifiably low Appraisal of Promotability based on racial discrimination. The Supreme Court's review is necessary to settle the conflict created by this decision, between California and Federal

law as established in *McDonnell Douglas* and *St. Mary's Honor Center.*

Respectfully submitted,

LARRY D. WALLS
In Propria Persona
3831 West 60th Street
Los Angeles, California 90043
(213) 296-9857

APPENDIX A

ORDER

Cite as 97 Daily Journal D.A.R. 6541

LOS ANGELES COUNTY OFFICE
OF THE DISTRICT ATTORNEY,
Plaintiff and Appellant,

v.

CIVIL SERVICE COMMISSION OF THE
COUNTY OF LOS ANGELES,
Defendant and Respondent;

No. B083586
(Super. Ct. No. BS021369)

LARRY D. WALLS,
Real Party in Interest.

LOS ANGELES COUNTY OFFICE
OF THE DISTRICT ATTORNEY,
Plaintiff and Respondent,

v.

CIVIL SERVICE COMMISSION OF THE
COUNTY OF LOS ANGELES,
Dfendant [sic];

LARRY D. WALLS,
Real Party in Interest and Appellant.

No. B086243
(Super. Ct. No. BS021369)
California Court of Appeal
Second Appellate District
Division Seven
Filed May 22, 1997

THE COURT:

The unpublished opinion in this case having been filed on May 7, 1997, and request for certification for publication having been made,

IT IS HEREBY CERTIFIED that the opinion meets the standards for publication specified in rule 976(b) of the California Rules of Court; and

ORDERED that the words "Not to be Published in the Official Reports" appearing on pages 1 and 19 of said opinion be deleted and the opinion herein be published in the Official Reports.

LILLIE, P.J. WOODS, J. FRUIN, J.*

EMPLOYMENT LAW

Customary Transfer of Employee After Serving for Set Period of Time Isn't A Racially Motivated Act.

Cite as 97 Daily Journal D.A.R. 6541

LOS ANGELES COUNTY OFFICE OF THE DISTRICT ATTORNEY,
Plaintiff and Appellant,

v.

CIVIL SERVICE COMMISSION OF THE COUNTY OF LOS ANGELES,
Defendant and Respondent;

LARRY D. WALLS,
Real Party in Interest.

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* Assigned by the Chairperson of the Judicial Council.

No. B083586
(Super. Ct. No. BS021369)

LOS ANGELES COUNTY OFFICE
OF THE DISTRICT ATTORNEY,
Plaintiff and Respondent,

v.

CIVIL SERVICE COMMISSION OF THE
COUNTY OF LOS ANGELES,
Defendant;

LARRY D. WALLS,
Real Party in Interest and Appellant.

No. B086243
(Super. Ct. No. BS021369)
California Court of Appeal
Second Appellate District
Division Seven
Filed May 7, 1997

CONSOLIDATED APPEALS from a judgment and an order of the Superior Court of Los Angeles County. Robert H. O'Brien, Judge. Reversed in part and affirmed in part.

Hausman & Sosa, Jeffrey M. Hausman and Larry D. Stratton, for Plaintiff and Appellant.

Ramsey & Price and Robert Ramsey, Jr., for Respondent and Appellant Larry D. Walls.

The Los Angeles County District Attorney's Office (D.A.) appeals the trial court's judgment denying a peremptory writ of mandamus. The D.A. had challenged the Los Angeles County Civil Service Commission's order raising a promotion examination score of deputy district attorney Larry Walls, an African American, and finding

the D.A. racially discriminated against Walls. In a separate appeal consolidated with the D.A.'s appeal, Walls contests the trial court's order denying him an award of attorney's fees under the "private attorney general" doctrine set forth in Code of Civil Procedure section 1021.5.

FACTUAL AND PROCEDURAL BACKGROUND

Since 1983, Walls was a deputy district attorney. In 1984, he was promoted from a Grade I to a Grade II attorney.

Walls applied for a Grade III position in 1986. The Grade III position, as with all promotions, required taking an examination as a prerequisite. Walls received an "86" out of a "100" maximum score on his appraisal of promotability (AP). The AP written evaluation stated, "Mr. Walls does not volunteer for extra work. He willingly does what he is asked to do but does not pick up things without being asked." The evaluation also stated, "although he is not necessarily a legal scholar, he has obtained outstanding jury results because of his confidence and ability to communicate with jurors." Feeling these comments were racial, Walls appealed to then-District Attorney Ira Reiner. The statements were removed, but Walls's score remained. Walls then appealed the score to the civil service commission. Prior to the hearing on the matter, Walls and the D.A. reached a settlement whereby the D.A. raised Walls's AP score to a "91." Walls was then promoted to the Grade III status effective April 1988.

On February 1, 1988, Walls was transferred to the D.A.'s Hardcore Gang Prosecution Unit in Compton. This

unit, comprised of about 40 attorneys county-wide and about 13 or 14 in Compton, required special training due to the difficulty of the cases. Generally, the immediate supervisor, referred to as the deputy-in-charge, would make the case assignments.

In early 1989, the deputy-in-charge position in Walls's unit became open. Walls was interested in the position but was not selected. Instead, Grade III attorney John Allen was appointed. While Allen was Walls's immediate supervisor, he complained to Genelin about Walls only wanting to try certain types of cases.

Once Allen kidded Walls about being transferred to Lancaster. When Allen reassured Walls this was just a joke, Walls replied, "Oh good, because if anyone tried to take me out of Compton Hardcore, I'll sue and charge racial discrimination."

Allen subsequently was promoted to become Assistant Head Deputy of the Hardcore Gang Prosecution Unit. Grade III attorney Joseph Markus filled the deputy-in-charge position in June 1989. This was Markus's first supervisory job with the D.A.

In the fall of 1989, then-Bureau Director for Central Trials, deputy district attorney John Lynch, arranged a meeting with Walls to discuss an investigation of a jailhouse informant Walls used in 1986 to prosecute a Carlos Vargas for murder. The informant had accused Walls of paying the informant to testify falsely. Making a pun out of Lynch's name, deputy district attorney Mark Ashen kidded Walls he was going to be lynched. Overhearing the pun, Markus remarked, in a pretend Southern accent,

"Yes, the office is going to have a lynching. We've got a rope and all they need is a nigger. And Walls, you're it."[1]

Within the next day or two of the "lynching" comments, Markus told Walls he should not have made the comments and would not make such statements anymore.

In January 1990, Michael Genelin, head deputy of the county-wide Hardcore Prosecution Gang Unit, met with Walls and Markus in response to Walls's letter to Reiner stating Walls was under stress. Walls wrote the *Vargas* case caused him stress, but did not indicate he was having problems with Markus. At the urging of the then-Director of Special Operations, Russell Murphy, Genelin asked Walls if he wanted to be transferred. Walls said he wanted to remain in the Hardcore Gang Prosecution Unit.

In a probationary performance evaluation dated March 5, 1990, Genelin rated Walls as a superior attorney. Genelin noted Walls carried a particularly demanding caseload, he had good [sic] as opposed to exceptional legal reasoning, his oral presentation was one of his strong suits, had a good attitude toward prosecuting defendants, exhibited outstanding initiative, performed well in new situations and was well-thought by his colleagues.

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[1] Markus denied making such comments. Instead, he claimed upon overhearing Ashen make a pun out of Lynch's name, Markus asked, "What is this about lynching a nigger?" Regardless of what exactly was said, the D.A. placed a letter of reprimand in his personnel file.

In June 1990 a promotional examination for Grade IV Deputy District Attorney, considered a supervisory position, was announced. Candidates were rated for the period of June 30, 1989 to June 29, 1990. Walls and 130 other attorneys applied. The applicants included Markus and two other attorneys from Walls's unit, Barbara Turner and African American Greta Walker. As part of the application process, Walls submitted a self-evaluation, rating himself an "A" in all six categories.

The applicants' supervisors conducted an initial appraisal reviewed by the five-member AP committee which met in September 1990. The committee was comprised of committee chair Chief Deputy District Attorney Gregory Thompson, the Assistant District Attorney, Murphy,[2] the Director of Central Operations and the Director of Branch Operations. Since Markus also applied for the Grade IV promotion, he was prohibited from evaluating Walls, and Genelin performed the initial evaluation instead. The Chief Deputy was responsible for ensuring all candidates are measured using the same scale. At the conclusion of the AP committee meetings, a committee member conducted a breakdown by race, ethnicity and gender. To promote minorities, "it is not unusual for some scores to be adjusted upward in order to provide a more favorable balance."

The appraisers assigned letter grades in the following six factors: (1) Professional Knowledge and Skills, (2) Work Ethic, (3) Professional Relations, (4) Adaptability, (5) Dependability and (6) Managerial Ability. The letter

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[2] He later became Assistant District Attorney.

grades had the respective meanings: "A" – exceptionally qualified; B – well qualified; C – qualified; D – limited potential; and E – not qualified. Combined, the letter grades translated into a numerical score, with "100" being the highest score requiring all "A's."

When Walls was assigned a case entitled *People v. Russell*, Markus advised Genelin that Walls did not want this case because of the facts in the case.

In July 1990, before Walls went on vacation on July 30, he notified Markus of the witness problems in *Russell*. This case was set for trial during Walls's scheduled vacation. Markus told Walls he did not have time to prepare the case, and for Walls to either get the trial continued or dispose of the case. Walls nevertheless gave the case to Markus, who assigned the case to Walker the Friday before Walls went on vacation. Walker asked Walls if they had witnesses, and he told her they were not subpoenaed. The case was later dismissed because witnesses were not located.[3] This was the only case assigned to Walls which was dismissed in 1990.[4]

On August 1, 1990, Markus wrote a memorandum stating Walls spent the week before his vacation doing nothing, and then on his last day before vacation handed Markus the *Russell* case.

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[3] Walker eventually refiled the case, and obtained a murder conviction.

[4] The prior year another case assigned to Walls was dismissed.

When Walls returned to work in mid-August 1990, Genelin met with Walls, Allen and Markus. Genelin questioned Walls about *Russell*.

Thereafter, on August 15, 1990, Walls asked Markus for a copy of the memorandum. Yelling, Markus refused to give Walls a copy. When Walls returned to his office after a court appearance, he found a copy on his chair.[5] Walls wrote a reply memorandum addressed to Reiner.

The next day, on August 16, Markus demanded a copy of Walls's reply memorandum. After getting a copy from the secretary, Markus started screaming at Walls and threatened to get him transferred from "this cushy job that you have." Markus refused to leave Walls's office for two hours, and taunted Walls to "settle the matter man to man."[6]

Two or three days later, Markus called an office meeting where he apologized to the office for his unprofessional conduct.

Sometime after Walls sent the memorandum to Reiner, Genelin and later Murphy asked Walls if he wanted to be removed from the Compton unit. Walls replied, "no."

Meanwhile, Genelin conducted the initial appraisal of Walls, Walker, Markus, Turner and all the other Grade IV applicants in Genelin's unit. Rather than rely on

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[5] Murphy testified he put a copy of his memorandum on Walls's chair.

[6] Sometime afterward, Murphy reprimanded Markus for losing control and getting into a shouting match with Walls.

Markus for input, Genelin spoke with Allen and reviewed the candidates' performance evaluations. Genelin initially graded Walls an "A" in Factor 1, "B" in Factors 2, 4 and 5, and "C" in Factors 3 and 6, but then the AP committee raised Walls to an "A" in Factor 5 and a "B" in Factor 6.

Murphy received the evaluations Genelin prepared because, as Director for Special Operations, Murphy had overall responsibility for the Hardcore Gang unit. Murphy met with the initial evaluators, including Genelin, to "try to come to some relative assessment of the strengths and weaknesses of various candidates within the Bureau of Special Operations" and "try to determine who were the candidates who had the greatest predictability factor to be effective Grade IV deputies." He gave little weight to raw statistics of the number of cases tried or won because of cases' varying difficulty and trial length.

Murphy completed the final written portion of the AP. He rated Walls a "B" instead of "A" in the Work Ethic factor because he believed Walls's strong reaction against the D.A.'s decision not to oppose *Vargas*'s motion to vacate his conviction and for a new trial demonstrated Walls did not fully appreciate the ethical demands of trying criminal cases. Feeling Walls was difficult to supervise and not receptive to constructive criticism, Murphy did not change Genelin's rating of "C" in the Professional Relations factor. The committee believed Walls's confrontation with Markus over his handling of the *Russell* case showed Walls had poor relations with his supervisors. Nor did Murphy change the "B" Genelin gave Walls in the Adaptability factor, feeling Walls had not exhibited sufficient adaptability to changed circumstances in the

Vargas case when he so strongly opposed the D.A.'s decision to permit a new trial for the defendant. Murphy also thought it took far less for Walls to get stressed than any of the other lawyers in the Hardcore Gang unit. Murphy rated Walls an "A" in Professional Knowledge and Skills based on Walls's trial skills. Murphy kept the "B" grade for Managerial Ability because Murphy believed Walls had no supervisory experience in the office, and "we never saw any of the types of traits that we look for in leaders." Murphy thought Walls deserved a "qualified" or "C" rating, but rated him "well qualified" or a "B" to "give him the benefit of the doubt."

Genelin gave Markus, Walker and Turner "A's" in all categories, as well as nine other applicants in other Hardcore Gang branch offices. Genelin graded Markus highly because he thought it was exceptional for a supervisor to try seven jury trials in a three-year period and supervise up to thirteen deputies. Markus, Turner, Walker and 29 other attorneys rated "100" and received "A's" in all 6 factors, 45 other applicants rated "95," 33 applicants rated "90," 13 applicants rated "85," and Walls and 7 other applicants rated "80."

Of the eight applicants who scored an "80," one was a woman of unidentified race, six were white males and Walls was the only black man.

On September 23, 1990, Allen, who became the assistant head deputy of the Hardcore Gang Prosecution Unit, informed Walls he was being transferred to a downtown regular trial assignment. Without involving Markus, Genelin made the decision to transfer Walls. Markus did not learn of the transfer beforehand. It was the D.A.

management's policy to transfer attorneys from the Hardcore Gang Prosecution Unit after two to three years of service in the unit.

On October 1, 1990, Walls sent Reiner a letter discussing for the first time Markus's racial comments made in 1989.

Walls brought two administrative appeals, Case No. 90-371 regarding his transfer from the Compton Hardcore Gang Prosecution Unit and Case No. 90-386 regarding his AP score.

At the administrative hearing before the civil service commission, Walls testified he had the highest caseload and tried the most cases in comparison to Markus, Turner and Walker. Regarding *Russell*, Walls testified it was the D.A. witness coordinator's responsibility to serve subpoenas for trial. After Walls learned his witness coordinator did not subpoena the witnesses, Walls had the secretarial staff prepare subpoenas and give them to an investigator to serve. He testified the Markus memorandum was the first time a supervisor wrote a memorandum about a case being dismissed because of witness problems. Walls also testified the *Russell* incident "showed some bias" on Markus's part.

Genelin testified it was the deputies who were responsible for generating subpoenas. He felt Walls should have gotten the subpoenas in the *Russell* case out "immediately after the last continuance on that case or the last setting on that case. . . . " Genelin felt Walls acted inappropriately in waiting until the week before *Russell* was set for trial.

Murphy testified the way Walls handled the *Russell* case precipitated the decision to transfer Walls out of the Hardcore Gang unit. He thought the dismissal of the case because witnesses were not subpoenaed is inexcusable for a lawyer in a special prosecution unit. "And keep in mind, I had virtually all the special units under my wing, and I could not recall this ever happening where a murder case had been dismissed because subpoenas weren't issued." However, even if the *Russell* incident had not occurred, "Walls probably would have been transferred before the end of the calendar year. . . . He might have lasted a few more months before he was transferred, but the decision was that . . . given the effect upon morale in the division over the shouting match that had occurred and some other breakdowns, the time was just right to make the move."

Genelin testified he decided to transfer Walls out of the Hardcore Gang unit because "Walls was having extreme difficulty in cutting it. I mean by that, he was not doing the job, and because of his inability to handle the caseload that was required, and that other people then had to pick up the slack. That's not an approach you can have."

Regarding the AP process, Genelin testified he used the same criteria for Walls as for all the other Grade IV applicants within Genelin's Hardcore Gang division. Genelin explained he graded Walls less than exceptionally well qualified in work ethics because Walls only wanted to try cases he was certain of winning, and Genelin "did not feel that his attitude was responsive to the needs of the department." Genelin gave Walls a "C" in professional relations because his relationships with

police officers, support staff and management deteriorated. Genelin graded Walls a "B" in dependability because Genelin could no longer depend on Walls "to do the job. He did not seem to be available to take on an additional caseload. He was not a volunteer." Genelin rated Walls a "C" in managerial ability because he thought Walls would have problems in relationships, training, police control and making decisions.

Genelin further testified the earliest time to transfer a deputy from the Hardcore Gang Unit "could be a year." The maximum time for a deputy to remain in the unit was generally three or three and a half years. Genelin made one exception for a deputy who was in trial for one and a half years on one case, and was transferred out right after the case ended. The second exception he made was because he wanted an experienced deputy to open up a new Hardcore Gang branch office. "There's an overall policy in the office that deputies should not be at singular locations for extended periods of time; they get complacent or slough off. . . . I'm not sure this is really watched too much in the regular trial units, but because special units are high profile, it's watched in the specialty units."

On January 3, 1992, the hearing officer issued a report on Walls's two administrative appeals. In the report, the hearing officer blamed Walls for not issuing witness subpoenas in the *Russell* case before going on vacation. "Not only did this result in the murder case against Russell being dismissed, although it was later reinstituted, Walls compounded his fault by not admitting his error. Rather, in my view, Walls escalated the situation by getting into a loud, public and very unprofessional confrontation with his supervisor over the

matter. Markus obviously also acted unprofessionally in this regard but his conduct, however, is not at issue in this case. . . . [¶] Under these circumstances I believe management was warranted in believing that Walls and Markus could no longer be trusted to work together in the same office and that one of them had to be transferred. Since Walls, in any event, was shortly due for a routine transfer out of Hardcore having already served for two and one-half years, management opted to transfer Walls and not Markus. In my opinion, there was little or no evidence presented at the hearing that the stated reason for the transfer was a pretext to cover up the District Attorney's discriminatory motivation." The hearing officer concluded, "the weight of the evidence does not establish discriminatory motivation by the District Attorney in transferring Walls from the Compton Hardcore Unit. The evidence convinces me that management had good sound business reasons for ordering the transfer."

Regarding Walls's appeal of his AP score, the hearing officer opined, "I do not believe Markus' conduct in the *Vargas* case incident demonstrates that he was Exceptionally Qualified in Professional Relations and deserved the A rating he received in this factor. Nor does Markus' unprofessional conduct in the Russell case demonstrate [sic] that he was also Exceptionally Qualified in Managerial Ability and deserved the A rating in this factor. Even though Walls was clearly at fault in this incident, there is no excuse, in my opinion, for Markus answering Walls [sic] unprofessional conduct in kind. A good manager should be able to find other means to deal with subordinates, even those exhibiting the degree of hostility

shown by Walls in this incident. [¶] However, Walls has not established that the other applicants receiving 100 scores were also undeserving. Accordingly, a pattern of underrating Walls and overrating all others has not been established by the evidence. All we are left with, thus, is the unwarranted disparity in ratings between Walls and Markus. Since I have no authority to lower the ratings received by Markus, the only remedy available to redress this apparent disparity is to adjust Walls' ratings upward. . . . " The hearing officer recommended raising Walls's AP score to a "90."

Thereafter, the civil service commission issued findings of fact and a decision sustaining Walls's appeal of his transfer and appeal of his AP score. The commission found Walls ."an extremely productive Deputy District Attorney who handled [a] large number of important felony cases and secured an above-average number of convictions. His Performance Evaluations have been Outstanding or Very Good and he has received commendations from the District Attorney." The commission concluded Walls established, by a preponderance of the evidence, his transfer was discriminatory and his AP score of "80" was improper.

In December 1992, the commission issued an order to both transfer Walls back to the Compton Hardcore Gang Unit and raise his AP score to "100."

On February 25, 1996, the D.A. petitioned for writ of mandate challenging the civil service commission's decision for Walls.

After the trial court held a hearing on the petition on March 22, 1994, the court denied the petition.

On April 20, 1994, the trial court entered a judgment denying the D.A.'s petition for writ of mandate.

Following the judgment, Walls filed a costs memorandum seeking attorney fees. On June 28, 1994, the trial court issued an order granting the D.A.'s motion to strike Walls's attorney fees request.

DISCUSSION

The D.A. appeals the trial court's denial of its petition for writ of mandate challenging the civil service commission's decision, and Walls appeals the denial of an award of attorney fees. We consider the D.A.'s appeal first, as our decision on the first appeal affects the outcome of the second appeal in that a reversal of the judgment denying the petition would necessarily preclude an attorney fees award to Walls.

Where, as here, the commission ruled for the employee on a discrimination claim and the employer sought a writ of mandate pursuant to Code of Civil Procedure section 1094.5, we review the administrative record as a whole to determine whether substantial evidence supports the Commission's findings. (*Los Angeles County Department of Parks and Recreation v. Civil Service Commission* (*Castaneda*) (1992) 8 Cal.App.4th 273, 279-280; *City and County of San Francisco v. Fair Employment & Housing Com.* (1987) 191 Cal.App.3d 976, 984.) "Substantial evidence" is not "synonymous with 'any' evidence. It must be reasonable . . . , credible, and of solid value. . . . [Citation.]" (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633.) Under this deferential standard, "when two or more inferences can reasonably be

deduced from the facts, a reviewing court is without power to substitute its deductions for those of the [trier of fact]." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 874.)

I.

RAISING PROMOTION EVALUATION SCORE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

The D.A. first contests the commission's raising Walls's AP score to "100" as not supported by substantial evidence.

The uncontradicted evidence showed the AP evaluators applied the same criteria to Walls as to the other Grade IV applicants, with the exception Genelin performed the initial evaluation of all applicants under Markus's immediate supervision without involving Markus. This exception promoted fairness because Markus also applied for the Grade IV promotion.

If anything, Walls was treated more favorably than he deserved, since the uncontroverted evidence was Murphy graded Walls a "B" rather than a "C" in Managerial Ability to "give him the benefit of the doubt." Further, Walls did not refute evidence of the AP committee practice of raising some scores in order to promote minorities.

Genelin, Murphy and Thompson corroborated each other's administrative hearing testimony on the AP process, including the giving of little weight to "raw" statistics of attorneys' caseloads. Since the Grade IV position often required managerial responsibilities, it was appropriate to give minimal consideration to the number of

cases a Grade IV candidate handled. It was also appropriate to give little weight to raw caseload statistics because such statistics do not take into account the varying complexity and length of individual cases. Moreover, all the testifying evaluators agreed Walls's reaction to the D.A.'s decision to permit a new trial in the *Vargas* case showed Walls lacked flexibility and a full appreciation of the ethical demands of trying criminal cases. Even the hearing officer found Walls's reaction "indicates a strong deficiency" in the Work Ethics factor.[7]

Although the hearing officer found Markus did not deserve a perfect AP score, he determined Walls did not establish the other 129 applicants "were also undeserving." In an effort to remedy the disparity between Markus's and Walls's AP scores, the hearing officer raised Walls's AP score. Rather than remedy unfairness, this decision was unfair to the other 129 applicants, since it was not based on whether Walls earned a higher score than the AP committee gave him.

Walls maintains since some of his case assignments were at the Grade IV level, there was no nexus between

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[7] Citing *Mixon v. Fair Employment & Housing Com.* (1987) 192 Cal.App.3d 1306, 1310, footnote 2, Walls criticizes the D.A. as improperly citing the hearing officer's report and recommendation. However, footnote 2 does not prohibit citation to an initial trier of fact's findings and recommendations. Rather, the Mixon court merely stated an administrative law judge's proposed decision "is in no way binding" on a state agency. In any event, even if the D.A. improperly referred to the hearing officer's conclusions, the D.A. did not commit a fatal error, as the D.A. properly relied on the evidence at the administrative hearing.

his AP score of "80" and his actual performance. This argument lacks merit, as it is uncontroverted the other attorneys in the Compton Hardcore Gang unit also received complex cases. In fact, the very unit was designed to handle difficult cases.

"The decision to promote an employee to a managerial position involves proper subjective and discretionary factors, and it is not the function of the administrative agency or the court to substitute its judgment for the employer's. [Citations.]" (*Castaneda, supra,* 8 Cal.App.4th at p. 283.)

In light of the entire administrative record, we hold there is no substantial evidence to support raising Walls's AP score.

II.

RACIAL DISCRIMINATION FINDING NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

The D.A. next contests the civil service commission's order finding the D.A. racially discriminated against Walls by transferring him out of the Hardcore Gang Prosecution Unit in Compton.

Where, as here, a minority employee alleges less favorable treatment than non-minorities, federal standards often govern. (*Castaneda, supra,* 8 Cal.App.4th at p. 280.) Accordingly, a three-step analysis applies. Under this analysis, the employee must first prove a prima facie case of discrimination by a preponderance of the evidence. If the employee succeeds, the burden of proof

shifts to the employer to articulate a legitimate, nondiscriminatory reason for the decision against the employee. If the employer meets this burden, the employee "must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." (*Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 253-254.)[8]

Walls quotes *Mixon v. Fair Employment & Housing Com.* (1987) 192 Cal.App.3d 1306, 1318, as setting forth the applicable standard for making out a prima facie case: "(1) complainant belongs to a protected class; (2) his job performance was satisfactory; (3) he was discharged; and (4) others not in the protected class were retained in similar jobs, and/or his job was filled by an individual of comparable qualifications not in the protected class." In quoting *Mixon*, Walls omits the beginning of the sentence stating, "The prima facie case for discriminatory discharge can therefore be stated thusly. . . . " (*Ibid.*) This omission is relevant because Walls was not discharged; he was merely transferred without demotion and given a score on a promotion examination not to his liking.

Walls failed to make a prima facie race discrimination case. The uncontroverted evidence was a transfer from

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[8] Local civil service rules also gave Walls the burden of proof. Los Angeles County Civil Service Rule 4.12 (Title V, Appendix 1) provides in pertinent part: "In hearings on discharges, reductions or suspensions in excess of five days, the burden of proof shall be on the appointing power. . . . In all other types of hearings the burden of proof shall be on the petitioner."

the Hardcore Gang unit after two and a half years was not unusual and in fact complied with management's policy to transfer attorneys after two to three years in this special unit. Walls offered nothing to contradict the evidence Markus was not involved in the decision to transfer Walls. Moreover, the evidence showed Walls did not apprise management of Markus's racial comments until after Allen informed Walls he was being reassigned from the Hardcore Gang division.

"While a complainant need not prove that racial animus was the sole motivation behind the challenged action, he must prove by a preponderance of the evidence that there was a 'causal connection' between the employee's protected status and the adverse employment decision." (*Mixon v. Fair Employment & Housing Com., supra,* 192 Cal.App.3d at p. 1319.) The record here is devoid of any evidence of a nexus between Markus's racial comments and Walls's transfer. Likewise, since Markus was not involved in evaluating Walls's Grade IV application, there is no causal connection between his AP score and Markus's comments.

Even assuming Walls made a prima facie discrimination case, the D.A., through Genelin and Murphy, articulated a legitimate, nondiscriminatory reason for transferring Walls – he mishandled the *Russell* case. Rather than offer evidence showing this reason was a mere pretext for discrimination, Walls merely insinuated racist motives for the transfer. At the administrative hearing, Walls testified with respect to who made the decision to transfer him, "I don't know who made the decisions. But I think it was motivated by Markus and it was

because of his feelings about black people." Such testimony is mere speculation not supported by any evidence.

On appeal, Walls cites to the part of the administrative record containing a memorandum from Allen to Genelin dated August 24, 1990. The memorandum discussed the August 1990 meeting between Allen, Genelin, Markus and Walls. According to the memorandum, at the meeting, Genelin questioned Walls about whether he was trying to avoid the *Russell* case. Walls replied "no" and explained he had a prior "run in" with the investigating officers. The memorandum then stated Markus "was supportive about this prior case. At this point, Michael [Genelin] asked Larry [Walls] to look him in the eye while he told Larry that Larry was responsible for seeing that" witnesses be served. Even if, as Walls argues, Genelin's conduct toward Walls were [sic] "a remarkable display of condescension," the scenario described in the memorandum does not amount to substantial evidence of racial discrimination.

Walls counters the D.A. disparately treated him in criticizing his handling of *Russell* because another attorney, Linda Bushling, received a "100" AP despite her conducting an inappropriate "photo lineup." In arguing disparate treatment, Walls cites the portion of the record where Allen testified Bushling "messed up the investigation" of another case by showing an eyewitness a single photograph of an accused rather than multiple pictures. Walls argues the cited portion of the record shows Bushling was not reprimanded or disciplined for her mishandling the witness interview. However, in response to whether Allen disciplined or recommended disciplining Bushling, Allen replied he told Markus and his successor

deputy-in-charge to advise Bushling not to conduct a witness interview in the way she did. Allen's answer could be interpreted as his recommending an informal reprimand for Bushling's mistake. More importantly, Walls cites no evidence showing Bushling's circumstances are even remotely similar to his.[9]

III.

REVERSAL OF JUDGMENT MOOTS APPEAL OF DENIAL OF ATTORNEY FEES UNDER PRIVATE ATTORNEY GENERAL DOCTRINE

In appealing the denial of attorney's fees, Walls argues he was entitled to a fee award under Code of Civil Procedure section 1021.5. This statute codifies the "private attorney general" doctrine. It gives courts discretion to award attorney's fees to a party who prevails in an action resulting "in the enforcement of an important right affecting the public interest" if certain elements are met. (Code Civ. Proc., § 1021.5.)

Our overturning the judgment moots Walls's appeal because he is no longer a prevailing party. Accordingly, we must uphold the trial court's order denying Walls attorney fees.

---

[9] In addition, Walls miscites the record as including testimony from Genelin that the Vargas case did not play a role in Walls's AP. However, the portion of the record Walls cites quotes his attorney's argument at the administrative hearing. The attorney stated, "I believe there is already testimony from Mr. Genelin that the *Vargas* case played no part in determining Mr. Walls' appraisal-of-promotability score." Clearly, counsel's argument cannot be equated to testimony or any other kind of evidence.

DISPOSITION

The judgment is reversed and remanded with directions to issue a writ commanding the civil service commission to both vacate its order and enter a new order denying Walls's appeal of his AP score and appeal of his transfer. The trial court's order denying Walls attorney fees is affirmed. Costs on the D.A.'s appeal are awarded to appellant D.A. The parties are to bear their own costs on Walls's appeal.

LILLIE, P.J.

We concur:
WOODS, J.
FRUIN, J.

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* Assigned by the Chairperson of the Judicial Council.

APPENDIX B

ORIGINAL

2nd Civil Nos. B083586 and B086243
L.a. Superior Court No. BS 021369

Rulings Due 6-6-97
Opinion by Justice L/W/F*
Answer due 5-25-97

IN THE COURT OF APPEAL

SECOND APPELLATE DISTRICT

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, OFFICE OF THE DISTRICT ATTORNEY,

Petitioner/Appellant,

vs.

CIVIL SERVICE COMMISSION OF THE COUNTY OF LOS ANGELES; LARRY D. WALLS,

Respondents.

May 30, 1997
Denied
/s/ Lillie
/s/ Woods
/s/ Fruin

PETITION FOR REHEARING OF RESPONDENT LARRY D. WALLS

(Filed May 22, 1997)

ROBERT RAMSEY, Jr. Esq.
RAMSEY & PRICE
State Bar No. 58077
727 West 7th Street, Suite 624
Los Angeles, California 90017
(213) 612-0020

Attorneys for Respondent

APPENDIX C

Second Appellate District, Division Seven,
No. B083586/B086243
S062142

IN THE SUPREME COURT OF CALIFORNIA

LOS ANGELES COUNTY OFFICE OF
THE DISTRICT ATTORNEY, Appellant

v.

CIVIL SERVICE COMMISSION OF
THE COUNTY OF L.A., Respondent

LARRY D. WALLS, Real Party In Interest
And Companion Case

(Filed July 23, 1997)

Real Party In Interest's petition for review DENIED.

/s/ R. George
Chief Justice

APPENDIX D

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

Date: March 22, 1994	
Honorable ROBERT H. O'BRIEN, Judge	**DAROLYN JENSEN, Deputy Clerk**
NONE, Deputy Sheriff	**E. VELASCO, E.R.M.**

BS021369

COUNTY OF L.A. ET AL.,	Counsel for Plaintiff JEFFREY HAUSMAN (X)
CIVIL SERVICE COMMISSION OF COUNTY OF L.A. ET AL.,	Counsel For Defendant TYRONE SHEPPARD (X)

NATURE OF PROCEEDINGS:

MOTION FOR PEREMPTORY WRIT OF MANDATE;

Matter is called for trial, argued and taken under submission.

Petitioner's exhibit 1 (8 volumes of transcript of proceedings) is admitted in evidence. Administrative record and exhibits are admitted in evidence by reference to the court file in this action.

Later: Petition denied. There is substantial evidence supporting the subject decision.

Petitioner has excessively violated the "15 page" rule relating to length of briefs by filing a 54 page "Summary of Testimony"; however, the court has read portions of this document.

The record does not establish real party in interest as a "great trial lawyer" or "probably the hardest working lawyer in the prestigious Gang Unit". Moveover, [sic] there is substantial evidence of legitimate concern about the standard real parties overall performance.

Nevertheless, there is equally substantial evidence (indeed uncontroverted) that real party was subjected to racial ridicule by use of the term "nigger" and alluding to a "lynching". This evidence in conjunction with the later denials of his advancements, supports the decision. It is clear that racial discrimination, animus, etc. need not be the *sole* grounds for concluding improper actions. Here, there is substantial evidence supporting the conclusion of discrimination.

Counsel for petitioner to prepare, serve and file in Department 85 a proposed judgment and proposed statement of decision no later than 7 days following the date of this order.

* * *

APPENDIX E

CIVIL SERVICE COMMISSION

COUNTY OF LOS ANGELES

In the matter of LARRY D. WALLS,	)	CASE NOS. 90-371, 90-386
Appellant	)	**FINDINGS OF FACT AND**
v.	)	**DECISION**
OFFICE OF THE DISTRICT ATTORNEY,	)	
Respondent.	)	

FINDINGS OF FACT

1. Appellant commenced his employment with Respondent in July 1983, and was promoted to Deputy District Attorney II and again to Grade III, the latter as a result of a settlement of Civil Service charges brought against Respondent by Appellant claiming his Appraisal of Promotability score in the Grade III examination was unfairly too low.

2. In February 1988 Appellant was assigned to the Hardcore Gang Unit in Compton which handles prosecution of serious crimes involving gang members which are very difficult cases to try because of fear of retaliation by witnesses.

3. Appellant prosecuted a rape/murder case against Carlos Vargas in which he used so-called jailhouse informants.

4. In 1989 Respondent conducted an investigation into the use of jailhouse informants in obtaining convictions. In this connection on November 3, 1989 Appellant was called to discuss his role in the Vargas case by John Lynch who was conducting the investigation.

5. In discussion of the matter by Appellant with other Deputy District Attorneys in the office, Mark Ashen, in a play on words referring to John Lynch, remarked that Appellant was going to be "lynched". The Head Deputy of the office, Joseph Markus, came into conversation and stated "there was going to be a lynching, they had a rope and all they needed was a nigger", referring to Appellant.

6. Markus was subsequently reprimanded by Respondent for his role in the incident.

7. Defendant Vargas later filed to have his conviction set aside and a new trial ordered because of alleged improper use of jailhouse informers in his case by Appellant.

8. When management decided not to oppose the motion, Appellant strongly protested in letters to the Los Angeles Times and to the District Attorney and requested a six months paid stress leave which was denied.

9. Management attempted without apparent success to justify its decision to Appellant but he remained opposed, considering the decision an attack on his integrity.

10. In January 1990 Appellant was assigned the case of *People v. Russell* which involved a murder charge.

Appellant objected to the assignment believing the charge of murder was not appropriate.

11. After a number of postponements the Russell case came on for final trial on Monday, July 30, 1990 which was also the day Appellant was scheduled to commence his vacation.

12. On prior Friday morning, Appellant requested Markus to arrange for service of subpoenas on witnesses required for trial. Several days before, Markus had instructed Appellant to arrange for such service in accordance with office practices that trial attorney was responsible for ensuring that subpoenas were served.

13. Since the time remaining before trial was too short, witnesses were not subpoenaed resulting in dismissal of case. Charges were subsequently refiled, case was assigned to another attorney and a conviction was obtained.

14. When Appellant returned from his vacation he was called to task by management for his handling of Russell case. This led to a loud public and unprofessional confrontation between Appellant and Markus in which both stated they were no longer able to work with other [sic].

15. On September 24, 1990, Appellant was transferred out of the Hardcore Unit to another office where he was to perform regular Deputy District Attorney duties. Markus was not selected for transfer despite the fact that he, and not Appellant, had used an inappropriate and offensive racial epithet.

16. In June 1990 a promotional examination for Grade IV Deputy District Attorney was announced to be conducted by an Appraisal of Promotability. Appellant and 130 other attorneys applied. Final appraisal scores were:

32 applicants rated 100
45 applicants rated 95
33 applicants rated 90
13 applicants rated 85
8 applicants rated 80 (including Appellant)

17. As of date of hearings, no appointments to Grade IV have been made because of lack of openings.

18. Candidates were appraised A (Exceptionally Qualified) through F (Not Qualified) on six factors: Professional Knowledge and Skills, Work Ethic, Professional relations, Adaptability, Dependability and Managerial Ability.

19. Appellant was initially rated A in Factor 1, B in Factors 2, 4 and 5, and C in Factors 3 and 6. Three other applicants from Compton Hardcore, including Joseph Markus, were rated A in all six factors for a perfect 100 scores. In addition, nine other candidates from other Hardcore offices received scores of 100.

20. Upon review of all initial ratings, the Appraisal Committee raised Appellant's ratings in Factor 5 from B to A and in Favor 6 from C to B which gave him a final score of 80.

21. Appellant was an extremely productive Deputy District Attorney who handled large number of important felony cases and secured an above-average number of

convictions. His Performance Evaluations have been Outstanding or Very Good and he has received commendations from the District Attorney.

CONCLUSION OF LAW

1. Appellant has established by a preponderance of the evidence that his transfer from the Compton Hardcore Unit was discrimination in violation of Civil Service Rule 25.01.

2. Appellant has established by.a preponderance of the evidence that he was improperly rated 80 on the Appraisal of Promotability in the examination for Deputy District Attorney IV.

DECISION

Appellant's appeal of Respondent's decision to transfer Appellant in Case No. 90-371 is sustained. Appellant's appeal of his Appraisal of Promotability score in Case No. 90386 is sustained and his final score raised from 80 to 100.

BEFORE THE CIVIL SERVICE COMMISSION OF THE COUNTY OF LOS ANGELES

In the matter of the appeals of his involuntary transfer in the position of Deputy District Attorney III, Office of the District Attorney, on his claim of racial discrimination and the Appraisal of Promotability score received in the examination for Deputy District Attorney IV, of: **LARRY D. WALLS** **(Case Nos. 90-371 and 90-386)**	ORDER OF THE CIVIL SERVICE COMMISSION

On December 2, 1992, the Civil Service Commission of the County of Los Angeles, after reading the transcript and having read the foregoing Findings of Fact and Conclusions of Law, and good cause appearing therefor, and the Commission being duly advised in the matter, overruled both objections and adopted, as constituting its final decision, the findings, conclusions and decision to raise the Appraisal of Promotability score to 100 and

order that the appellant be transferred back to the Hard-core Gang Unit of the Compton office.

Dated this 9th day of December, 1992.

/s/ Moises R. Luna
MOISES R. LUNA, President

/s/ George S. Nojima
GEORGE S. NOJIMA, Member

(absent)
WADE A. PISTON, Member

/s/ Tom Salata
TOM SALATA, Member

/s/ Anita Vigil
ANITA VIGIL, Member

APPENDIX F

CIVIL SERVICE COMMISSION

MEETING DATE	ITEM #
FEB 20 1992	8
JUN 17 1992	6
JUL 1 1992	8

Findings are submitted denying the appeal of the involuntary transfer and raising the Appraisal of Promotability score from 80 to 90, in the matter of the appeal of **LARRY D. WALLS** of his involuntary transfer in the position of Deputy District Attorney III, Office of the District Attorney, on his claim of racial discrimination (Case No. 90-371) and the Appraisal of Promotability score received in the examination for Deputy District Attorney IV (Case No. 90-386), and objections thereto (Hearing Officer: Leonard S. Kimmell).

ACTION TAKEN

[ ] HEARING GRANTED

[ ] HEARING DENIED

[ ] DENIED

[ ] RECEIVED AND FILED

[ ] HEARING CANCELLED

[ ] PROPOSED DECISION

[✓] NEW PROPOSED DECISION

[ ] FINAL DECISION

[ ] ORDERED HEARING DE NOVO

7/1/92 AFTER READING THE TRANSCRIPT THE COMMISSION OVERRULED THE

DEPARTMENT'S OBJECTIONS AND SUSTAINED THE APPELLANT'S OBJECTIONS. ANNOUNCED AS THE NEW PROPOSED DECISION OF THE COMMISSION TO RAISE THE APPRAISAL OF PROMOTABILITY SCORE TO 100 AND TO ORDER THAT THE APPELLANT BE TRANSFERRED BACK TO THE COMPTON OFFICE. COMMISSIONERS NOJIMA AND PISTON DISSENTED.

CARRIED OVER TO:

(DATE)	REASON
Off Agenda	IN ORDER FOR THE COMMISSION TO READ THE TRANSCRIPT.
7-1-92	*AT THE REQU'EST OF THE COMMISSION.*

APPENDIX G

CIVIL SERVICE COMMISSION

MEETING DATE	ITEM #
OCT -7 1992	4
OCT 28 1992	6

New proposed decision to be rendered in the matter of the appeal of **LARRY D. WALLS** of his involuntary transfer in the position of Deputy District Attorney III, Office of the District Attorney, on his claim of racial discrimination (Case No. 90-371) and the Appraisal of Promotability score received in the examination for Deputy District Attorney IV (Case No. 90-386).

ACTION TAKEN

[ ] HEARING GRANTED

[ ] HEARING DENIED

[ ] DENIED

[ ] RECEIVED AND FILED

[ ] HEARING CANCELLED

[ ] PROPOSED DECISION

[✓] NEW PROPOSED DECISION

[ ] FINAL DECISION

[ ] ORDERED HEARING DE NOVO

10/28/92 AFTER READING THE TRANSCRIPT THE COMMISSION ANNOUNCED AS ITS NEW PROPOSED DECISION TO ACCEPT THE FINDINGS, CONCLUSIONS AND DECISION TO RAISE THE APPRAISAL OF PROMOTABILITY SCORE TO 100 AND ORDER

THAT THE APPELLANT BE TRANSFERRED BACK TO THE COMPTON OFFICE.

CARRIED OVER TO: (DATE)	REASON
10-28-92	*IN ORDER FOR THE LEGAL ADVISOR TO MODIFY THE FINDINGS CONSISTENT WITH THE COMMISSION'S DECISION OF JULY 1, 1992.*

APPENDIX H

CIVIL SERVICE COMMISSION

MEETING DATE	ITEM #
DEC -2 1992	10

Findings are submitted raising the Appraisal of Promotability score to 100 and ordering that the appellant be transferred back to the Compton office, in the matter of the appeal of **LARRY D. WALLS** of his involuntary transfer in the position of Deputy District Attorney III, Office of the District Attorney, on his claim of racial discrimination (Case No. 90-371) and the Appraisal of Promotability score received in the examination for Deputy District Attorney IV (Case No. 90-386), and objections thereto.

ACTION TAKEN

[ ] Hearing Granted

[ ] Hearing Denied

[ ] Denied

[ ] Received and Filed

[ ] Hearing Cancelled

[ ] Proposed Decision

[ ] New Proposed Decision

[✓] Final Decision

[ ] Hearing De Novo

12/2/92 AFTER READING THE TRANSCRIPT, THE COMMISSION OVERRULED BOTH OBJECTIONS AND ADOPTED, AS CONSTITUTING ITS FINAL DECISION, THE FINDINGS, CONCLUSIONS AND DECISION TO

RAISE THE APPRAISAL OF PROMOTABILITY SCORE TO 100 AND ORDER THAT THE APPELLANT BE TRANSFERRED BACK TO THE HARDCORE GANG UNIT OF THE COMPTON OFFICE.

CARRIED OVER TO:
(DATE) *REASON*

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_____

_____

_____

_____